embedded security).[80/] The Besen & Gale Appendix to the GI Comments argues that, even after a national renewable security interface is adopted, there will be no benefit to a Commission rule addressing such integration.[81/] The Coalition, to the contrary, believes that Commission rules preserving such integration would be harmful, perhaps fatally, to achieving competitive commercial availability in the marketplace.

Explaining this competitive revolution to consumers will be difficult enough. But at least those old enough to remember the transition to competitive telephone CPE will have a frame of reference. Now, imagine that Part 68 had allowed the Bell companies to offer formats of telephones, integrated with other features and functions, that were unavailable to competitive suppliers; and that most newly manufactured devices offered by the Bells looked and worked differently than the competitive models. The credibility of the new consumer telephones would have been extremely difficult to establish.

In the present circumstance, the transition is more challenging. Consumers will need to absorb the idea of obtaining the host device wherever they choose, and obtaining the security card or module separately from the MVPD operator. In the context of a system operator that

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[80/] GI Comments at 10, 51, 57, 60; NCTA Comments at 3, 27-29; Time Warner Comments at 30.

[81/] Besen & Gale, GI Comments App. A at 18.

does not support the interface in its own devices, the competitive alternative is certain to appear confusing and may in fact be poorly supported. Moreover, preserving embedded security indefinitely will defeat renewability -- the main security attraction of the interface.

A. "Smart Cards" Furnished By System Operators Should Address The Security Function Only.

Standardizing an interface that allows the MVPD operator to include other features and functions on the "security" card would distort the marketplace, increase customer confusion, and detract from renewability.[82/] First, consumers would have to adjust to the idea not only of security cards or modules, but also that those provided by some system operators duplicate or conflict with the features and functions built into their host device. If, to avoid this, the operator supplied a different security card for use with its "own" devices, this would further confuse the consumer. Either way, the system would be providing one level of functionality for its own implementation and another for the competitive implementation. Such a difference in functionality should be unacceptable.

These disparities are fundamentally inconsistent with the constructive proposals of NCTA and Time Warner for a common, software configurable, hardware platform in the host

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[82/] These long-term inefficiencies and redundancies would far outweigh the short-term efficiencies of undermining the interface though local integration. E.g., Besen & Gale, GI Comments App. A at 17-18.

device. To realize the inherent efficiencies and lack of redundancy of such an approach, the "security" card or module should supply only the security circuitry.[83/]

B. MVPD Operators Should Not Be Allowed To Offer New Devices That Lack The Security Interface Between All Security And Non-Security Circuitry.

It would be equally destructive to competitive commercial availability if, as some commenters have proposed, system operators were to be allowed to keep placing new devices in service that lack the security interface. The Coalition has taken pains in these Reply Comments to clarify that those devices *presently in distribution to consumers* should generally be allowed to remain in service subject to phase-out.[84/] However, after

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[83/] GI, through Besen & Gale, suggests that, to the extent a security interface is standardized, there ought to be multi-industry negotiations, involving manufacturers, MVPDs, and retailers, as to the drawing of the security/non-security line. Id. at 17. We believe this to be a constructive suggestion and (coupled with specific performance requirements of the sort we recommend herein) would look forward to participating in such an endeavor.

[84/] There may be cases in which recently deployed digital devices function in a way that is at odds with system support of portability. In such case, the system operator, in order to meet a performance requirement, may need to remove such devices from service. In its Comments, the Coalition argued that, given Congress's clear intention in passing Section 629, deployment of such devices pending the issuance of regulations in this proceeding should be at the risk of the system operator. See CERC Comments at 6. The Coalition, which welcomes the support of cable MSOs for a national security interface, hopes that an early start on implementing standards can minimize any such inconvenience, and pledges to cooperate in private-sector efforts to this end.

the dates certain advocated in our comments, devices lacking the security interface that are not already in service should not be distributed.

If, on one hand, new integrated devices function differently from those procured competitively, the toll in redundancy, differences in consumer operation, and resulting consumer confusion would be enormous. If, on the other, the integrated devices are designed to operate in the same way as the security card/competitive host model, there seems little reason to leave the security interface out of the device. The cost of supporting the interface will in the long term be far outweighed by the loss of security renewability and operator flexibility in failing to support it.[85/] If, as cable operators assert, their customers ultimately pay for breaches in security, the decision to omit the interface is one for which the customers will pay.

The Coalition believes it is one thing to respect the investment already made in non-renewable devices. It is another to undermine the competitive model by providing new devices that are at odds with it.

[85/] Maintaining integrated units in service would make it more difficult, or impossible, to renew security in units with the capability.

V. THE COMMISSION HAS THE POWER AND THE MANDATE FROM CONGRESS TO TAKE THE ACTIONS NECESSARY IN THIS PROCEEDING TO ACHIEVE COMPETITIVE COMMERCIAL AVAILABILITY OF NAVIGATION DEVICES.

Before and after the enactment of the 1996 Telecomm. Act, the Commission had the power to assure competitive commercial availability through its regulations. All that changed in 1996 was that it received a clear congressional mandate to do so.

A. The Law Clearly Imposes No Constraint On the Commission's Standard-Setting Power In This Proceeding.

Some commenters argue that the so-called Eshoo amendment[86/] curtails the Commission's authority to require separation of security from other non-security functions of navigation devices, to prescribe the "Decoder Interface" connector for analog devices, and to otherwise establish standards in this proceeding.[87/] Others complain that Congress did not issue a sufficiently specific grant of power for the Commission to act. These attempts to circumscribe the Commission's authority in this proceeding are contrary to the face of Section 629 and express pronouncements in the legislative history to the 1996 Telecomm. Act.

[86/] Section 301(f) of the 1996 Telecomm. Act, codified at Section 624A of the Communications Act, 47 U.S.C. § 544a(a)(4).

[87/] See generally Comments of Echelon Corporation. See also Scientific-Atlanta Comments at 26-27; Comments of the Ad Hoc Computer and High-Technology Coalition (CHTC) at 14-19.

1. No other provision of the 1996 Telecomm. Act even colorably constrains Commission authority under Section 629.

As the CERC Comments noted, irrespective of any constraints the Eshoo Amendment imposes in implementing Section 624A in ET Docket 93-7 (cable compatibility), the Commission has full authority to use any available tool in this proceeding for the purpose of complying with Section 629.[88/] The legislative history for the Eshoo Amendment, Section 301(f) of the 1996 Telecomm. Act, makes clear that the provision has no application in these proceedings:

> [Subsection 301(f)] is not intended to restrict the Commission's authority to promote the competitive availability of converter boxes, interactive communications devices, and other customer premises equipment as required by [Section 304].[89/]

Similarly, with regard to Section 629 of the Communications Act (Section 304 of the 1996 Telecomm. Act), the House Report states that: "[T]he Committee does not intend that section [301(f)] in any way limits or circumscribes Commission authority under section [304]."[90/]

Thus, it could not be clearer that Congress in no way intended the Eshoo Amendment to restrict the Commission's authority in implementing Section 629. There is no impairment of the Commission's authority to require separation of security from non-security functions of

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[88/] CERC Comments at 22-23 n.20.

[89/] H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 111 (1995).

[90/] Id. at 113.

navigation devices, to foster the availability of CPE with standard security interfaces, and to take other measures to promote competitive availability of navigation devices pursuant to Section 629's mandate.

2. Section 629's text imposes no constraint on standard-setting authority.

Section 629(f) clearly stipulates that this Section neither adds to nor detracts from Commission authority as it existed before enactment of the Eshoo Amendment:

> COMMISSION'S AUTHORITY.--Nothing in this section [629] shall be construed as expanding or limiting any authority that the Commission may have had under law in effect before the date of enactment of the Telecommunications Act of 1996.

Thus, Section 629 provides no limitations on the Commission's pre-Eshoo Amendment authority.

B. There Is Ample Precedent for Meaningful Commission Action Even Without The Clear Mandate Furnished by Section 629.

As a general matter, the Commission has broad powers and authority to regulate cable, satellite, common carriers, and other MVPDs. The Federal Communications Commission was created

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and

> radio communication service with adequate facilities at reasonable charges . . . .[91/]

The Commission is charged with executing and enforcing the provisions of the Communications Act, which expressly "apply with respect to cable service, to all persons engaged within the United States in provided such service, and to the facilities of cable operators which relate to such service, as provided in Title VI."[92/]

The Communications Act further defines the powers of the Commission, "from time to time, as public convenience, interest, or necessity requires . . . to regulate the provision of direct-to-home satellite services."[93/] Moreover, the Commission has broad authority to regulate common carriers and to remedy unjust and unreasonable charges and practices.[94/] In addition, the Commission may use, and has used, its equipment authorization program to further important policy objectives.[95/] In enacting

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[91/] Section 1 of the Communications Act, 47 U.S.C. § 151 (as amended).

[92/] Section 2 of the Communications Act, 47 U.S.C. § 152(a).

[93/] 47 U.S.C. § 303(v).

[94/] See id. § 201 (declaring that "[a]ll charges, practices, classifications, and regulations for and in connection with such [common carrier] communication service, shall be just and reasonable"); id. § 205 (providing that after full opportunity for hearing, "the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed").

[95/] See Tandy Comments at 11, n.4 & citations therein.

Section 629, and charging the Commission, in its regulations, with assuring the commercial availability of navigation devices used to access any services from MVPDs generally, the Congress recognized the broad extent of the Commission's powers.

The Commission deregulated and unbundled telephone CPE without any direct mandate whatever from the Congress. Section 629 itself notes that the requirement for the Commission to assure competitive commercial availability is made without any necessity to expand the Commission's power, and without any intention to detract from it. Though some Commenters may argue that the Commission should identify reasons to refrain from taking measures to assure commercial availability, they are hard put indeed to argue that the Commission lacks the power or authority to fulfill the mandate that Congress so recently declared.

VI. ARGUMENTS FOR EXPANDING OR CURTAILING THE EXPLICIT SCOPE OF SECTION 629's SUBSIDY PROVISION ARE INSUBSTANTIAL AND UNPERSUASIVE.

Several commenters pose arguments suggesting that Congress should have written a different subsidy provision. What Congress wrote, however, is clear and concise.

A. The Subsidy Provision Applies Only To MVPD System Operators That Offer Navigation Devices Directly To Consumers.

Section 629's anti-subsidy provision, by its own terms, only applies when an MVPD offers navigation devices directly to consumers. The Section 629 subsidy prohibition does not

apply when consumers procure their navigation devices from unaffiliated retailers or vendors. Thus, the Act does not prohibit price rebates offered by such independent retailers in connection with DBS or other navigation devices.[96/] Such marketing strategies, offered in a competitive retail environment, are perfectly acceptable under the letter and spirit of the Act.

Conversely, where an MVPD operator provides navigation devices directly to consumers, price rebates, deep discounts, and equipment offered below-cost should be regarded with scrutiny to ensure that the price of the equipment is not subsidized by charges for service.[97/] Such pricing policies not only are likely to contravene the Act, they also deny independent manufacturers and retailers a fair shot at the market.

B. There Is No Support In the Provisions Or Policy Of Section 629 for Implied Exceptions.

Several commenters, in agreement with the Commission's tentative conclusion, have argued that Section 629's prohibition on equipment bundling and cross-subsidization should apply only to MVPDs that are subject to cost-of-service regulations (*i.e.*, major cable MSOs). These commenters argue that the cross-subsidization prohibition

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[96/] Accord Tandy Comments at 6.

[97/] See, e.g., Time-Warner Comments at 44-45 (discussing how the costs of deeply discounted equipment may be hidden in a long-term programming service agreement).

should not apply to cable providers that are subject to effective competition or to non-cable MVPD operators.[98/]

The statutory language of Section 629, however, contains no such restriction on its application.[99/] Because the statutory language is clear on its face, strained attempts to derive such a narrow application from legislative history are irrelevant and unconvincing.[100/] It is long-settled that "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 n.3 (1989).[101/]

Even if the legislative history were, arguably, relevant, it is unconvincing. GI and others point to the floor colloquy of Senators Faircloth and Burns for their primary support.[102/] With all due respect to Members of Congress and the legislative process, the colloquy of two Senators who did not have principal responsibility for this provision simply is not persuasive. More telling is the

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[98/] E.g., CellularVision Comments at 11; GI Comments at 76-80.

[99/] Section 629(a), 47 U.S.C. § 549(a), provides that the Commissions rules shall not prohibit MVPDs from offering CPE to consumers, "if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service."

[100/] E.g., GI Comments at 76-77; NCTA Comments at 39.

[101/] Thus, the floor colloquy of Senators Faircloth and Burns should be inconsequential regardless of any merit.

[102/] GI Comments at 76-77 nn.145-46.

fact that these commenters do not and cannot point to any congressional committee reports to support their arguments in this connection. Indeed, the committee reports contain no suggestion that the anti-bundling/anti-subsidy prohibitions should be limited to rate-regulated cable providers; rather, the conference and committee reports refer broadly to "telecommunications system operators" without such limitation.[103/]

Some commenters further suggest that the Commission's existing cable rate regulations fully satisfy the requirements of Section 629, and that the Commission need do nothing more on these issues.[104/] On the contrary, the fact that Congress enacted new bundling and subsidy prohibitions despite the existence of the Commission's existing cable rate regulations is persuasive evidence that Congress intended something more. If the Commission's existing rate regulations for rate regulated cable providers were sufficient in themselves, Congress would have found no need to enact new legislation on the issue. Attempts to sidetrack the clear legislative intent of Section 629 with arguments about a completely separate scheme of rate regulation are unavailing.

[103/] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 180-81 (1996); H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 113 (1995).

[104/] E.g., GI Comments at 80-81.

A few Commenters go so far as to suggest affirmatively that "Cable television operators should be permitted to bundle equipment with unregulated services, whether premium, or PPV, or new product tiers."[105/] Other Commenters assert that "Bundling should be properly viewed as a gradual capture of the equipment's cost through increased programming or service revenue and the [Section 629] bundling restrictions should be construed narrowly."[106/] Scientific-Atlanta points to original concerns about cable systems that required subscribers to rent converter boxes at exorbitant rates (which are not implicated here) and adds, without citation, that "Overall customer satisfaction with set-tops is much higher today than it was when the 1992 Cable Act was enacted."[107/] These issues are beside the point of Section 629. The focus here should be on the creation of a competitive retail market in navigation devices, and in enforcing Congress's concern that MVPD operators do not place competitively offered products at a disadvantage.

[105/] U S West Comments at 17.

[106/] Scientific-Atlanta Comments at 27.

[107/] Id. at 28.

VII. ARGUMENTS FOR DECLARING A "SUNSET" WITHOUT MAKING THE FINDINGS REQUIRED UNDER SECTION 629(e) ARE INCONSISTENT WITH THE LAW'S SPECIFIC TREATMENT OF THIS SUBJECT.

Section 629(e) sets forth three specific criteria for sunset, stating that the Commission regulations shall cease to apply when:

> (1) the market for the multichannel video programming distributors is fully competitive;
>
> (2) the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and
>
> (3) elimination of the regulations would promote competition and the public interest.[108/]

A. Findings As To Competition On The Service Level Are Not Dispositive Of The Other Findings Required.

Some commenters in the cable, satellite, and set-top box industries contend that the sunset requirements "should be read as flexibly as possible."[109/] To this end, they argue that "[r]elevant submarkets, both geographic and product, should be considered in determining whether the

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[108/] 47 U.S.C. § 549(e). Similarly, the Conference Report explains that the conference agreement "sunsets the regulations when the Commission determines the following: the market for the [MVPDs] is competitive; the market for equipment used in conjunction with the services is competitive; and elimination of the regulations are in the public interest and would promote competition." S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 181 (1996) (emphasis added).

[109/] GI Comments at 89; NCTA Comments at 42; Comments of the Satellite Broadcasting & Communications Association of America ("SBCA") at 13; Scientific-Atlanta Comments at 27.

criteria for sunsetting the regulations for a particular MVPD or particular equipment have been met."[110/]

More specifically, GI proposed that "the Commission sunset the application of the commercial availability requirements with respect to an individual cable system that is or becomes subject to effective competition and with respect to all cable systems nationwide if and when DBS attains a national penetration level of 10%."[111/] Using the analogy of cable rate regulations, GI explains that, for the same reasons, commercial availability regulations should no longer apply "when a cable system becomes subject to effective competition."[112/]

These comments disregard Section 629's three-prong test for sunsetting the regulations. First, Section 629 requires that the markets for both MVPDs and converter boxes be fully competitive before any sunset. Thus the fact that a single cable system may be subject to effective competition is not sufficient, in itself, to satisfy either the first or the second prongs of the sunset test.

Furthermore, the third prong of the sunset test requires a separate finding that "elimination of the regulations would promote competition and the public

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[110/] NCTA Comments at 42. See also SBCA Comments at 13 ("seek[ing] sufficient flexibility so as to mold the rules to conform with the realities of each technology operating in the context of its marketplace").

[111/] GI Comments at 91 (emphasis in original).

[112/] Id. at 93.

interest." Accordingly, even if the MVPD and navigation device markets are competitive, Section 629's implementing regulations should not be sunset without an additional finding that abolishing the regulations would (a) continue to promote competition and (b) serve the public interest.

B. Section 629(e) Is Based On Sound Policy Concerns.

While many commenters urge a loose reading of Section 629's sunset criteria, the Coalition urges the Commission to respect the requirements enacted by the Congress. Section 629(e)(3)'s requirement for a finding that sunset would promote competition and the public interest is especially telling. This criterion embodies Congress's recognition that appropriate regulations may be useful not only in creating competitive equipment markets, but also in continuing to assure the commercial availability of navigation devices. Premature sunset could allow any progress in this connection to subside before the benefits of commercial availability are fully realized.

VIII. CONCLUSION.

The response to the Notice in this proceeding shows that a dramatically successful result, saving consumers billions of dollars and avoiding much aggravation, is within the Commission's grasp. The elements for a "win-win" solution are all in place: analog and digital national security interfaces emerging from private sector standards

organizations; cable industry proposals for "launching" applications that allow computer and consumer electronics devices to function as set-top boxes; and a desire on the part of both system operators and manufacturers, that competitive commercial availability succeed.

Although parties differ as to the extent to which the Commission needs to act to assure success, most Commenters recognize that progress in technical standards is the key to competitive manufacture and sale. The Coalition believes that, in its initial May 16, 1997 Comments, it struck the right balance as to the specificity of performance requirement necessary to "assure" competitive commercial availability. With respect to removing the security obstacle, the Coalition urged:

- By January 1, 1998, the Commission should receive and publish particular NRSS and analog interface specifications to which such MVPD systems and devices must adhere.

- System operators should be required to offer NRSS cards and analog descrambler modules supporting competitively procured navigation devices, as appropriate, no later than July 1, 1998.

- MVPD systems must specify and support for all devices deployed on their system after January 1, 1999, including those they furnish directly to consumers: (a) a version of the NRSS for use in all digital system devices and (b) a nationally portable analog security interface for use in analog system devices.

The private sector also has made great strides in standardizing digital transmission. The Commission needs to assure that:

- Variations in transport and modulation methods are sufficiently compatible that the expense for devices to deal with local variations is relatively trivial; and
- Information as to such variations is adequately disclosed.

The Commission should require that MVPD systems that do not presently support competitive availability must, if MPEG-based, meet specified indicia of compatibility by July 1, 1998.

The Coalition is encouraged that leaders of the cable industry itself have stepped forward to suggest how navigation devices that are competitively manufactured and sold into a national marketplace can receive instructions so as to address the features, functions, look and feel of specific local systems. The Coalition is optimistic that cooperation in the private sector, spurred by specific performance requirements adopted in Commission regulations, will lead to a successful result in this proceeding, for American consumers and industry.

Respectfully submitted,

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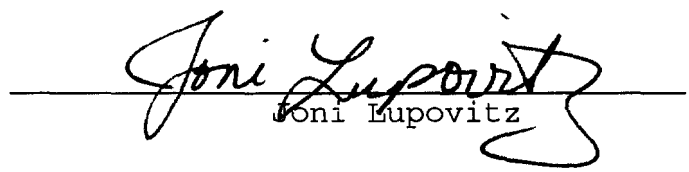

Joni Lupovitz

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